

Personal Representative of Salleh bin Saring (deceased) v Teo Tiam Teng

HIGH COURT (SHAH ALAM) — CIVIL APPEAL NO 12B-267-10 OF 2014
LIM CHONG FONG JC
23 SEPTEMBER 2015

Civil Procedure — Parties — Personal representative — Plaintiff commenced action against ‘personal representative’ of deceased and obtained summary judgment without first securing order appointing person to legally represent deceased’s estate — Whether non-compliance rendered plaintiff’s action nullity — Whether sessions court wrong to have granted plaintiff summary judgment — Whether defendant raised several other triable issues — Whether justice required deceased’s estate to be given opportunity at trial to challenge authenticity of documents relied upon by plaintiff and to interrogate and cross-examine relevant parties — Rules of Court 2012 O 15 r 6A(4)(a)

Claiming that he gave Salleh bin Saring (‘the deceased’), when the latter was alive, two friendly loans totalling RM600,000 which were not repaid, the respondent obtained summary judgment for that amount in the sessions court against the appellant after the deceased’s death. In granting the judgment, the sessions court held, inter alia, that the appellant did not deny that the deceased had signed two statutory declarations and a loan agreement the respondent relied upon as evidence of the loans. In opposing the summary judgment application, the appellant had argued that: (a) the respondent’s claim was a nullity for non-compliance with O 15 r 6A of the Rules of Court 2012 (‘the ROC’); (b) the alleged loans were unenforceable as they were shams masking interest-bearing loans given by an unlicensed moneylender; (c) no demand for repayment of the alleged loans were made when the deceased was alive and his estate had no knowledge of the said loans or of their non-repayment; and (d) the respondent’s claim was barred by reason of estoppel, laches and acquiescence. The appellant also pointed out that in an earlier sessions court suit, a licensed moneylending company controlled by the respondent had filed a claim against the deceased. The instant appeal was against the sessions court’s decision.

Held, allowing the appeal and setting aside the decision of the sessions court:

- (1) The respondent’s claim was plainly against the deceased’s estate. However, the respondent did not show any evidence that he had complied with O 15 r 6A(4)(a) of the ROC when challenged by the appellant. The consequence of the non-compliance was fatal. The

- A sessions court neither dealt with nor considered this vital point. The action was a nullity by reason that the proper defendant had not been named. The respondent's non-compliance per se was sufficient for this court to allow the appeal (see paras 15–16).
- B (2) Notwithstanding the non-compliance with O 15 r 6A, the other points raised by the appellant constituted triable issues or reasons necessitating a trial. In particular, it was puzzling why the respondent as director of a licensed moneylending company was willing in his personal capacity to enter into a non-interest-earning friendly loan of a significant sum of
- C RM600,000 with the deceased, a returning customer of his moneylending company, who had borrowed RM220,000 that ended in litigation in another sessions court. The bona fides, if not also the legality, of the transaction, seemed questionable. There was also merit in the appellant's argument that the action was intentionally commenced after
- D the demise of the deceased to render the defence burdensome (see paras 17–18).
- E (3) Justice required that the appellant was afforded pre-trial discovery and an opportunity at trial to produce expert evidence on the authenticity of the statutory declarations and loan agreement as well as to interrogate and cross-examine the relevant parties, particularly the respondent, since the facts were now all under his control (see para 19).
- F (4) As to the legal aspect of the point raised by the appellant on illegality by reason of contravention of the Moneylenders Act 1951, this was best left to be determined at trial depending on the eventual findings of fact (see para 20).

[Bahasa Malaysia summary]

- G Mendakwa bahawa dia memberi kepada Salleh bin Saring ('si mati'), ketika si mati masih hidup, dua pinjaman persahabatan berjumlah keseluruhannya sebanyak RM600,000 yang tidak dibayar, responden mendapatkan penghakiman ringkas bagi jumlah tersebut di mahkamah sesyen terhadap perayu selepas kematian si mati. Dalam membenarkan penghakiman, mahkamah sesyen memutuskan, antara lain, bahawa perayu tidak menafikan
- H bahawa si mati telah menandatangani dua perisytiharan statutori dan perjanjian pinjaman yang digunakan oleh responden sebagai bukti pinjaman-pinjaman tersebut. Dalam menentang permohonan penghakiman ringkas, perayu berhujah bahawa: (a) tuntutan responden adalah batal kerana ketidakpatuhan dengan A 15 k 6A Kaedah-Kaedah Mahkamah 2012 ('KKM');
- I (b) pinjaman-pinjaman yang didakwa tersebut tidak boleh dikuatkuasakan kerana ia adalah penipuan yang menyembunyikan pinjaman-pinjaman berfaedah yang diberikan oleh pemberi pinjaman tidak berlesen; (c) tiada tuntutan untuk bayaran balik terhadap pinjaman-pinjaman yang didakwa dibuat apabila si mati masih hidup dan estetnya tidak mengetahui mengenai

pinjaman-pinjaman tersebut atau mengenai mereka yang tidak membayar balik; and (d) tuntutan responden dihalang atas sebab estoppel, kelewatan dan persetujuan. Perayu juga menegaskan bahawa dalam tindakan mahkamah sesyen terdahulu, syarikat pemberi pinjaman wang berlesen yang dikawal oleh responden telah memfailkan tuntutan terhadap si mati. Rayuan ini adalah terhadap keputusan mahkamah sesyen.

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Diputuskan, membenarkan rayuan dan mengeneipkan keputusan mahkamah sesyen:

- (1) Tuntutan responden jelas terhadap estet si mati. Walau bagaimanapun, responden tidak menunjukkan apa-apa keterangan yang dia telah patuhi A 15 k 6A(4)(a) KKM apabila dicabar oleh perayu. Akibat ketidakpatuhan adalah serius. Mahkamah sesyen tidak berurusan ataupun mempertimbangkan poin penting ini. Tindakan adalah batal atas sebab bahawa defendan yang betul tidak dinamakan. Ketidakpatuhan responden itu sendiri adalah mencukupi bagi mahkamah membenarkan rayuan (lihat perenggan 15–16).
- (2) Meskipun ketidakpatuhan dengan A 15 k 6A, perkara-perkara lain yang dibangkitkan oleh perayu membentuk isu-isu yang boleh dibicarakan atau sebab-sebab yang memerlukan perbicaraan. Terutamanya, ia adalah membinggungkan mengapa responden sebagai pengarah syarikat memberi pinjaman wang berlesen sanggup dalam kapasiti peribadinya memasuki pinjaman persahabatan yang tidak menjana faedah bagi sejumlah besar sebanyak RM600,000 dengan si mati, pelanggan berulang syarikat memberi pinjaman wangnya, yang meminjam RM220,000 yang berakhir dengan litigasi di dalam mahkamah sesyen yang lain. Dengan suci hati, jika juga bukan kesahan transaksi, seolah-olah boleh dipersoalkan. Terdapat merit dalam hujahan perayu bahawa tindakan adalah secara sengaja dimulakan selepas kematian si mati untuk menyebabkan pembelaan membebaskan (lihat perenggan 17–18).
- (3) Keadilan mengkehendaki bahawa perayu diberikan penemuan pra perbicaraan dan peluang semasa perbicaraan untuk mengemukakan keterangan pakar atas ketulenan perisytiharan statutori dan perjanjian pinjaman dan juga untuk menyoal siasat dan memeriksa balas pihak-pihak yang relevan, terutamanya responden, memandangkan kesemuanya di bawah kawalannya (lihat perenggan 19).
- (4) Mengenai aspek undang-undang poin yang dibangkitkan oleh perayu atas kesalahan di sisi undang-undang oleh sebab pelanggaran Akta Pemberi Pinjam Wang 1951, ini sebaik-baiknya dibiarkan untuk ditentukan diperbicaraan bergantung ke atas dapatan fakta yang berlaku akhirnya (lihat perenggan 20).]

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A Notes

For a case on personal representative, see 2(4) *Mallal's Digest* (5th Ed, 2015) para 6681.

Cases referred to

- B** *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400; [1992] 1 CLJ 627, SC (refd)
Kerajaan Malaysia v Yong Siew Choon [2006] 1 MLJ 1; [2005] 4 CLJ 537, FC (refd)
- C** *Miles v Bulls* [1968] 3 All ER 632, QBD (refd)
Ngui Mui Khin & Anor v Gillespie Bros & Co Ltd [1980] 2 MLJ 9, FC (distd)
Sadhu Singh v Sellathurai [1955] 1 MLJ 117 (distd)
United Merchant Finance Bhd v Majlis Agama Islam Negeri Johor [1999] 1 MLJ 657; [1999] 2 AMR 1556, FC (refd)
- D** *Vithal Kumar all Jayaraman v Azman bin Md Nor* [2009] MLJU 785; [2010] 3 CLJ 332, CA (refd)
Wong Kim Fatt v Yong Kwet Yin [1996] 1 MLJ 45, HC (distd)
Wong Yoon Chai v Lee Ah Chin [1981] 1 MLJ 219, FC (distd)

E Legislation referred to

Moneylenders Act 1951
Rules of Court 2012 O 14, O 14 rr 3, 4, O 15 rr 6A, 6A(4)(a)
Razali bin Mohd Nor (Ahmad Fuad Amin & Partners) for the appellant.

F *N Kunasegaran (Kuna & Co) for the respondent.*

Lim Chong Fong JC:

INTRODUCTION

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[1] This is an appeal by the appellant/defendant against the summary judgment entered by the sessions court dated 23 September 2014 amounting to RM600,000 pursuant to two friendly loans given by the respondent/plaintiff to the appellant.

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[2] The sessions court judge, Tuan Aizat Akmal bin Maharani, held, inter alia, as follows in his brief grounds of judgment:

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[4] Tuntutan Plaintiff terhadap Defendan adalah berkaitan dus pinjaman persahabatan (friendly loan) sebanyak RM 200,000 pada 25/2/2008 dan sebanyak RM 400,000 pada 27/2/2009. Bagi pinjaman pertama, satu Surat Akuan oleh Salleh bin Saring telah ditunjukkan melalui Eksibit TTT-1 manakala untuk pinjaman kedua satu Perjanjian Pinjaman Wang dan Surat Akuan, kedua-duanya bertarikh 27/9/2009 oleh Salleh Bin Saring telah ditunjukkan melalui Eksibit TTT-2 ...

[6] Defendan melalui Affidavit yang difailkan telah membangkitkan bahawa Salleh Bin Saring, simati, tidak pernah memberitahu isterinya (Aini Binti Bunyamin) berkenaan hutang seperti yang dituntut oleh Plaintiff, bagaimanapun Affidavit Defendan telah gagal untuk menafikan kewujudan Surat Akuan dan Perjanjian Pinjaman telah ditanda tangani oleh simati. Defendan juga telah gagal untuk menyatakan bahawa tandatangan pada Surat Akuan dan Perjanjian Pinjaman tersebut bukan tandatangan Defendan. Atas alasan ini Mahkamah berpendapat bahawa berdasarkan Surat Akuan dan Perjanjian tersebut, simati sememangnya ada membuat pinjaman wang dari Plaintiff.

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[3] I heard the appeal on 21 August 2015. After having read the written submissions filed by the parties and hearing counsel, I allowed the appeal. The judgment of the sessions court was set aside with costs of RM3,500.

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[4] The respondent is dissatisfied and has on 18 September 2015 appealed against my decision to the court of appeal.

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[5] Hence, my grounds of decision are as follows.

SALIENT FACTS

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[6] A Salleh bin Saring deceased obtained two friendly loans from the respondent as allegedly evidenced by a statutory declaration dated 25 February 2008 for the sum of RM200,000 and a loan agreement cum statutory declaration dated 27 February 2009 for the sum of RM400,000.

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[7] Salleh bin Saring deceased failed to re-pay the loans to the respondent.

[8] However, Salleh bin Saring deceased passed away before the filing of the writ of summons in the sessions court. The appellant is named by the respondent as the representative of Salleh bin Saring deceased therein.

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CONTENTION OF THE PARTIES

[9] The respondent took the position that this is a clearcut case of recovery of loan advanced to Salleh bin Saring deceased that is maintainable against his estate after his demise relying on the Court of Appeal case of *Vithal Kumar a/l Jayaraman v Azman bin Md Nor* [2009] MLJU 785; [2010] 3 CLJ 332.

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[10] In brevity, the appellant raised the following points in opposing the respondent's summary judgment:

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- (a) the respondent's claim is a nullity for non compliance with O 15 r 6A of the Rules of Court 2012;

- A (b) the alleged friendly loans are unenforceable because they were shams that masked loans with interest given by an unlicensed moneylender;
- (c) there was no demand for repayment made during the lifetime of the Salleh bin Saring deceased and his estate has no knowledge of the alleged loans as well as non repayment at all material times;
- B (d) the respondent is estopped by reason of two earlier session court suits, to wit: Klang Sessions Court Saman No 52–32 of 2011 filed by the respondent against Mahmud bin Buyamin that involved the respondent as the done pursuant to a power of attorney given by Salleh bin Saring deceased and Sepang Sessions Court Saman No S1–52–21–02 of 2012 filed by Valuable Concept Sdn Bhd, a licensed moneylending company controlled by the respondent against Salleh bin Saring deceased; and
- C (e) the respondent's claim is barred because of estoppel, laches and acquiescence.
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FINDINGS OF THE COURT

- E [11] The relevant provision on summary judgment here is O 14 of the Rules of Court 2012. Generally by the provisions in O 14 rr 3 and 4, the plaintiff is entitled to judgment if the court is satisfied with the claim unless the defendant demonstrates that there is an issue or question in dispute that ought to be tried or that ought to be some other reason to be a trial of the action.

- F [12] In the Supreme Court case of *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400; [1992] 1 CLJ 627 Mohd Azmi SCJ held that:

- G *Under an O 14 application, the duty of a Judge does not end as soon as a fact is asserted by one party, and denied or disputed by the other on affidavit. Where such assertion, denial or dispute is equivocal, or lacking in precision or is inconsistent with undisputed contemporary documents or other statements by the same deponent or is inherently improbable in itself, then the Judge has a duty to reject such assertion or denial, thereby rendering the issue as not triable. In our opinion, unless this principle is adhered to, a Judge is in no position to exercise his discretion judicially under an O 14 application.*
- H *Thus, apart from identifying the issues of fact or law, the Court must go one step further and determine whether they are triable.* This principle is sometimes expressed by the statement that a complete defence need not be shown. The defence set up need only show that there is a triable issue.

- I *Where the issue raised is solely a question of law without reference to any facts or where the facts are clear and undisputed, the Court should exercise its duty under O 14. If the legal point is understood and the Court is satisfied that it is unarguable, the Court is not prevented from granting a summary judgment, merely because "the question of law is at first blush of some complexity and therefore takes a little longer to understand" (see *Cow v Casey* [1949] AER 197; and *European Asian Bank AG v Punjab & Sind Bank* [1983] 2 AER 508 at p 516). (Emphasis added.)*

[13] Furthermore in the Federal Court case of *United Merchant Finance Bhd v Majlis Agama Islam Negeri Johor* [1999] 1 MLJ 657; [1999] 2 AMR 1556, Mohamed Dzaiddin SCJ (later CJ) held as follows:

Our Order 14 r 3 is in pari materia with the English RSC 1965 Order 14 r 3. There are several authorities which considered the scope of the words 'some other reason to be a trial'. In Miles v Bull [1968] 3 All ER 632, the defendant and her husband had separated, but the former was in occupation of the matrimonial home which was sold by the husband to the plaintiff. The plaintiff then brought an action claiming possession of the property and applied for summary judgment. The master gave the defendant unconditional leave to defend. The plaintiff's appeal was dismissed. Megarry J found that nearly all the relevant facts were under the control of the plaintiff and the defendant would have to seek to elicit by discovery, interrogatories and cross-examination those facts which would assist her (the defendant). His Lordship reasoned that if the defendant could not point to a specific issue which ought to be tried, but nevertheless satisfied the court that there were circumstances that ought to be investigated, then the words 'there ought for some reason to be a trial' would be invoked.

At p 637, His Lordship explained:

Under r 3 and r 4 of the present RSC, Order 14, the defendant can obtain leave to defend if (and I read (13) from r 3(1)) the defendant satisfies the court 'that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial'. These last words seem to me to be very wide. They also seem to me to have special significance where (as here) most or all of the relevant facts are under the control of the plaintiff, and the defendant would have to seek to elicit by discovery, interrogatories and cross-examination those which will aid her. If the defendant cannot point to a specific issue which ought to be tried, but nevertheless satisfied the court that there are circumstances that ought to be investigated, then I think those concluding words are invoked. There are cases when the plaintiff ought to be put to strict proof of his claim, and exposed to the full investigation possible at a trial; and in such cases it would, in my judgment, be wrong to enter summary judgment for the plaintiff. In the present case the plaintiff's evidence initially consisted of a single affidavit in which brevity could scarcely be carried further. He has now amplified this by further evidence, but this is certainly not exhaustive or conclusive. The words 'there ought for some other reason to be a trial' seem to me to give the court adequate powers to confine RSC, Order 14, to being a good servant and prevent it from being a bad master. If I may adapt the language of Lord Parker of Waddington in *Daimler Co Ltd v Continental Tyre and Rubber Co (Great Britain) Ltd* (14), referred to in the notes to RSC, Order 14, in *The Supreme Court Practice 1967* (15), if the circumstances of the case are 'such as to require close investigation', this will 'preclude the propriety of giving leave to sign judgment under Order 14 r 1'. The question is thus whether this is such a case.

I think it is. In my judgment 'there ought for some other reason to be a trial'; and the reason is that of justice. By carrying through a transaction at unusual speed the defendant's husband is seeking to enable the plaintiff to do what he himself cannot do, namely, evict the defendant from her home. The husband has whatever rights the law gives him, and so has the plaintiff; but in the circumstances of the case I do not think it would be just if the plaintiff were able to enforce the rights that he

A claims without being put to strict proof that they do enable him to evict the defendant. I was told that in granting leave to defend Master Jacob said that the case was 'too near the bone for Order 14'. That, if I may say so, seems to me to summarise admirably what I have tried to express in greater detail. RSC Order 14, is for the plain and straightforward, not for the devious and crafty. There is here a case for investigation, and so not for summary decision. I also bear in mind what Bramwell LJ, said in *Harrison v Bottenheim* (16). Even on the old wording of RSC, Order 14, though a man cannot show a defence, still, if he has shown enough to entitle him to interrogate the plaintiff; the case is not within Order 14, and should not be pursued without his being allowed to defend. (Emphasis added.)

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[14] I shall firstly touch on the procedural point of non-compliance with O 15 r 6A which provides:

6A PROCEEDINGS AGAINST ESTATES (O 15 R 6A)

- D (1) Where any person against whom an action would have lain has died but the cause of action survives, the action may, if no grant of probate or administration has been made, be brought against the estate of the deceased.
- E (2) Without prejudice to the generality of paragraph (1), an action brought against 'the personal representatives of A B deceased' shall be treated, for the purposes of that paragraph, as having been brought against his estate.
- F (3) An action purporting to have been commenced against a person shall be treated, if he was dead at its commencement, as having been commenced against his estate in accordance with paragraph (1), whether or not a grant of probate or administration was made before its commencement.
- G (4) In any such action as is referred to in paragraph (1) or (3) —
- H (a) the plaintiff shall, during the period of validity for service of the summons, apply to the court for an order appointing a person to represent the estate of the deceased for the purpose of the proceedings or, if a grant of probate or administration has been made for an order that the personal representative of the deceased be made a party to the proceedings, and in either case for an order that the proceedings be carried on against the person appointed or, as the case may be, against the personal representative, as if he had been substituted for the estate;
- I (b) the court may, at any stage of the proceedings and on such terms as it thinks just and either of its own motion or on application, make any such order as is mentioned in sub-paragraph (a) and allow such amendments, if any, to be made and make such other order as the court thinks necessary in order to ensure that all matters in dispute in the proceedings may be effectually and completely determined and adjudicated upon.

- (5) Before making an order under paragraph (4), the court may require notice to be given to any insurer of the deceased who has an interest in the proceedings and to any person having an interest in the estate, if any, as it thinks fit. **A**
- (5A) Where an order is made under paragraph (4) appointing the Official Administrator to represent the estate of the deceased, the appointment shall be limited to his accepting service of the writ or originating summons by which the action was begun unless, either on making such an order or on a subsequent application, the court, with the consent of the Official Administrator, directs that the appointment shall extend to taking further steps in the proceedings. **B**
- (6) Where an order is made under paragraph (4), rules 7(4) and 8(3) and (4) shall apply as if the order had been made under rule 7 on the application of the plaintiff. **C**
- (7) Where no grant of probate or administration has been made, any judgment or order given or made in the proceedings shall bind the estate to the same extent as it would have been bound if a grant had been made and a personal representative of the deceased had been a party to the proceedings. **D**

[15] The claim of the respondent here is plainly against the estate of the Salleh bin Saring deceased. However the respondent has not furnished any evidence that he has complied with O 15 r 6A(4)(a) when challenged by the appellant. The consequences of non-compliance is fatal as seen in the Federal Court case of *Kerajaan Malaysia v Yong Siew Choon* [2006] 1 MLJ 1; [2005] 4 CLJ 537. In that case, Augustin Paul FCJ opined as follows: **E**

The court, on its own motion, invoked O 15 r 6A and allowed the appeal ... **F**

As Gopal Sri Ram JCA in writing for the court said:

Returning to the present case, we would observe that the respondent was perfectly entitled (by reason of O 15 r 6A) to commence the action in the manner intitled. But having done so, it did nothing else save to prosecute the action to judgment. In other words, there was blatant non-compliance with O 15 r 6A(4). **G**

It is our judgment that while O 15 r 6A is a remedial provision of adjectival law, it is important that a litigant who seeks to take advantage of it must comply with its terms before he or she may take advantage of any provision of substantive law. See, *Balachandran v Chew Man Chan* [1996] 1 CLJ 169; [1995] 4 MLJ 685 per Vincent Ng J; *Singapore Gems Co v The Personal Representatives for Akber Ali (deceased)* (supra). Non-compliance therefore renders the action more than a mere irregularity. The entire action is badly constituted as a matter of substantive law. For, it is only in an action against the duly appointed legal representative of the estate of a deceased that a judgment may be obtained that may be enforced against the assets of the estate. That is why O 15 r 6A(7) makes it abundantly clear that if the terms of O 15 r 6A are complied with then an order or a judgment obtained in the action shall bind the estate of a deceased person. Conversely, therefore, if the provisions of O 15 r 6A are not complied with then any order or judgment is useless as it would **H**

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- A be wholly unenforceable against the estate of the deceased.
- To summarise, the rule of substantive law is that an action may be commenced and maintained by or against the estate of a deceased after, and only after, letters of representation have been extracted. Ord 15 r 6A provides a very limited exception to that substantive rule by permitting the commencement of an action against the estate of a deceased even before the extraction of letters of representation. But it regulates the future prosecution of the action by requiring (in rule 6A(4)) certain steps to be taken in that respect and specifying the time limited for the taking of such steps. *Failure to observe the terms of rule 6A(4) of Order 15 will therefore deprive a plaintiff of the beneficial effect of rule 6A and thereby activate the principal rule of substantive law governing such actions so as to render the action already commenced a nullity.* As already stated in the preceding paragraph of this judgment that is what happened in the present case.
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- C The appeal is accordingly allowed. The order of the High Court is set aside. The plaintiff's action is dismissed with costs both in this Court and in the court below.
- D The deposit is to be refunded to the appellant.
- There can be no dispute that the judgment of the Court of Appeal is on excellent exegesis on O 15 r 6A. (Emphasis added.)
- E [16] The learned sessions court judge has neither dealt nor considered this vital point. The non-compliance by the respondent per se is sufficient for me to allow this appeal. The action is a nullity by reason that the proper defendant has not been named.
- F [17] That notwithstanding, I am also of the view that the second to the fourth points raised by the appellant constituted triable issues or reasons necessitating a trial. The learned sessions court judge appears to have only dealt cursorily with the third point but he wrongly concluded that the appellant did not contest the aforesaid statutory declarations and loan agreement allegedly made by Salleh bin Saring deceased. He has overlooked the police report dated 17 June 2014 of Aini bt Buymin, the widow of Salleh bin Saring deceased.
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- H [18] Prima facie, the second to the fifth points raised by the appellant are not in my view frivolous or fanciful. They appear to me to be interconnected triable issues of fact and/or law. As to the second point in particular, it is puzzling as to why the respondent as director of a licensed money lending company has been willing in his personal capacity to enter into a non interest earning friendly loan of a significant sum of RM600,000 with Salleh bin Saring deceased, a returning customer of his money lending company, Valuable Concept Sdn Bhd who borrowed RM220,000 that ended in litigation in the Klang sessions court. In other words, the bona fides if not also the legality of the transaction seems questionable. In this regard, I see merit too in the appellant's third point arguing that the action has been intentionally commenced after the demise of Salleh bin Saring deceased to render the defence burdensome.
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[19] In the circumstances, justice in my view requires affording the appellant pre-trial discovery and an opportunity at trial to produce expert evidence on the authenticity of the statutory declarations and loan agreement as well as to interrogate and cross-examine the relevant parties, particularly the respondent since the facts are now all under his control following *Miles v Bulls* [1968] 3 All ER 632.

[20] Finally as to the legal aspect of the second point raised by the appellant on illegality by reason of contravention of the Moneylenders Act 1951, I am mindful that the respondent has relied on *Ngui Mui Khin & Anor v Gillespie Bros & Co Ltd* [1980] 2 MLJ 9 and *Wong Kim Fatt v Yong Kwet Yin* [1996] 1 MLJ 45 to illustrate that friendly loans are not illegal. On the other side, the appellant has in rebuttal relied on *Sadhu Singh v Sellathurai* [1955] 1 MLJ 117 and *Wong Yoon Chai v Lee Ah Chin* [1981] 1 MLJ 219. It is plain to me that this is a fact sensitive issue and the facts in these cases aren't identical with that herein. My view is that this legal issue is best left to be determined at trial depending on the eventual findings of fact.

CONCLUSION

[21] It is for the foregoing reasons that I have allowed the appeal as so ordered.

Appeal allowed and decision of the sessions court set aside.

Reported by Ashok Kumar